Nos. 73-556 and 73-795

APR 17 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FLORIDA POWER & LIGHT COMPANY, *Petitioner*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL., *Respondents*

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

LAURENCE J. COHEN
ROBERT L. BARTON, JR.
1125-15th Street, N.W.
Washington, D. C. 20005

ROBERT E. FITZGERALD
53 West Jackson Boulevard
Chicago, Illinois 60604

SEYMOUR A. GOPMAN
16870 Northeast 19th Avenue
North Miami Beach, Florida
33162

Attorneys for Union Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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1. On April 16, 1974, the Chamber of Commerce filed a motion for leave to file a brief *amicus curiae* in these consolidated cases. As the motion states, the Chamber supports the position of the Petitioners, whose respective briefs were filed on March 8 and 13,

1974. Under Rule 42(2), the Chamber's brief *amicus curiae* was also due no later than March 13. Instead, it was filed 34 days later. This, perhaps coincidentally, was the day after the Union Respondents' brief in these cases was due and filed. The result is: first, that the brief tendered by the motion is untimely under this Court's rules; and, second, that as a result the Union Respondents have been given no opportunity (much less the full opportunity contemplated by Rule 42(2)) to reply to the Chamber's submission.

2. The foregoing would be grounds enough for denying the present motion. But there is more. The Chamber is, of course, on notice of Rule 42, which it cites in its motion. Moreover, on April 9, 1974, the undersigned counsel advised the Chamber's counsel that, because it would be out of time, the Union Respondents would object to the filing of a brief *amicus curiae* by the Chamber. (Letter of April 9, 1974 from Laurence J. Cohen to the Clerk of this Court, a copy of which was sent to counsel for the Chamber.) Nevertheless, the present motion seeks only leave to file, not also *leave to file out of time,* and does not even deal with, much less attempt to excuse, the Chamber's delay.

The circumstances surrounding the April 9 letter are as follows: On April 3, 1974, Ray C. Muller, Esquire, Counsel for Florida Power and Light, Petitioner in No. 73-556, advised the Clerk of this Court that he had received a request from the Chamber for his consent to file a brief as *amicus curiae* and that he was giving his consent "pursuant to Rule 42 of the Court." A copy of his letter was sent to counsel for the Union Respondents. Thus, counsel for the Chamber knew well before they actualy filed the present motion and

accompanying brief that they would do so. But no such request was made of the Union Respondents. Thus, the Chamber did not even advise the party most affected of its intent, and it was only through the copy of Mr. Muller's letter to the Clerk that the undersigned first learned that the Chamber contemplated filing such a brief. And, the Chamber took no subsequent action (such as providing page proof) to mitigate the adverse effects of its noncompliance with the Rules.

3. The Union Respondents as parties to this litigation, and the undersigned counsel as officers of this Court, welcome briefs *amicus curiae,* since they serve to assure that this Court is fully advised as to all of the ramifications of the issues to be decided. We therefore gave consent to the filing of a timely brief *amicus curiae* in support of Petitioners by the Graphic Arts Union Employers of America. But the decision-making process as it manifests itself in litigation is of an adversary character. And to further the the search for truth in a manner consistent with the adversary system, this Court's rules contemplate that each side will have the opportunity to make full response to the arguments presented by the other. It is doubtless for this reason that Rule 42(2) provides that a brief *amicus curiae* on the merits shall be "presented within the time allowed for the filing of the brief of the party supported." Thus, to allow an *amicus curiae* to file a brief when that of the party-opponent is in preparation, or, *a fortiori,* when it is already filed, undermines the process which this Court's rules envisage. And it is utterly unfair to the opposing party, such as the Union Respondents herein.

4. Finally, we must advise the Court that the Chamber's flouting of Rule 42(2) in this case, while

sufficiently serious by itself to require denial of the motion, is not an isolated lapse. The submission of briefs *amicus curiae* out of time has become a way of life with Chamber. In at least the following cases during the present Term, the Chamber has submitted briefs *amicus curiae* which were substantially (more than two weeks) out of time: No. 72-1554, *Super Tire* v. *McCorkle* (21 days late); No. 73-235, *DeFunis* v. *Odegaard* (34 days late); No. 73-631, *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, etc.* (24 days late); No. 73-640, *Gduldig* v. *Aiello* (31 days late). Moreover, in at least one recent case of which we are aware this Court has denied a motion by the Chamber "for leave to file an untimely brief, as *amicus curiae.*" (*Cleveland Board of Education* v. *LaFleur,* and *Cohen* v. *Chesterfield City School Board,* 414 U.S. 905.

For the foregoing reasons, the Motion by the Chamber of Commerce for Leave to File an *Amicus Curiae* Brief should be denied.

Respectfully submitted,

LAURENCE J. COHEN
ROBERT L. BARTON, JR.
1125 - 15th Street, N.W.
Washington, D. C. 20005

ROBERT E. FITZGERALD
53 West Jackson Boulevard
Chicago, Illinois 60604

SEYMOUR A. GOPMAN
16870 Northeast 19th Avenue
North Miami Beach, Florida 33162

Attorneys for Union Respondents

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